

GE/Housatonic River Site

State and Federal Trustees
Response to Public Comments on draft Memorandum of Agreement

Prepared April 2, 2002

The Trustees for the GE/Housatonic River site held an informal comment period on a draft Memorandum of Agreement (MOA) made available to the public in October 2001. The comment period was held in response to a request by the public for an opportunity to review the draft MOA and provide input to the Trustees on various aspects of the restoration planning process as outlined in the MOA. The Trustees present their collaborative response to the comments received from the public as indicated below.

Comment #1: Wherever “unanimous” is written as it pertains to voting or agreements, consider changing the requirement to a two-thirds (2/3) vote so any one Trustee agency does not have the power to veto a potential restoration idea.

Trustee Response: The Trusteeships of EOE, CTDEP, DOI, and NOAA for natural resources affected by the GE/Housatonic River site overlap; therefore, all decisions made pursuant to the MOA for restoration planning and implementation are based on unanimous consent. Such a voting structure assures an equitable decision-making process for the Trustees and is a standard operating procedure for Trustee Councils charged with overseeing the restoration of resources under the authority of multiple agencies. As spelled out in the MOA, 1) the Massachusetts restoration plan must receive unanimous approval by the Federal Trustees and the Massachusetts Trustee, 2) the Connecticut restoration plan must receive unanimous approval by the Federal Trustees and the Connecticut Trustee, and 3) the Joint Plan must receive unanimous approval of all Trustees.

Comment # 2: Wherever “cleanup” is written, change it to “containment” because no cleanup of the Housatonic River has occurred to date. The polychlorinated biphenyls (PCBs) that have been removed from various locations, have merely been relocated to containment areas in Pittsfield, New York, and other locations in the United States. Any combustion of Housatonic River PCBs creates other (sometimes more toxic) chemicals.

Trustee Response: The Trustees have deferred to the term “cleanup” as used by the regulatory agencies, EPA, MA DEP, and CT DEP.

Comment #3: A number of comments were received regarding *ex-officio* delegates and public participation:

- 1) Three (3) comments were received expressing opposition to allowing only one *ex-officio* member on the Trustee Council or SubCouncils.
- 2) A commenter indicated a belief that the public would be better served by Trustee Council and SubCouncil meetings that, other than privileged executive sessions, are open at all times rather than through the designation of one *ex-officio* member.
- 3) Four (4) comments requested that the restoration planning process and Trustee Council and SubCouncil meetings allow public participation and are as open to the public as possible
- 4) A Commenter requested that the majority of Trustee Council and SubCouncil meetings be held in Berkshire County.
- 5) One comment requested stronger language in the MOA for securing the involvement of the public in restoration planning.

- 6) How large can the Trustee sub-council be, and still be effective?
- 7) One commenter references the formation of a “committee” by the CT Trustee and expresses concern with the membership of that group.

Trustee Response: The Trustees reiterate their commitment to a full and meaningful process for participation by the public and non-voting delegates in the restoration planning and implementation process. The Trustees will take the submitted recommendations under consideration. Several of the above comments also contained nominations for or against certain individuals as *ex-officio* members. Decisions on the number and selection of *ex-officio* delegates are outside the scope of the MOA and will not be so defined within the document. In addition, decisions on the procedural operations of the Council and SubCouncils will be decided by the Trustees, with input by the public, after the MOA is executed and the Trustee Council and SubCouncils are officially established. As a standard practice, the Trustees do plan to hold Council meetings open to the public in the Berkshires (for Massachusetts Restoration Planning meetings) and in western CT (for the CT Restoration Planning meetings) with the exception of executive sessions.

In regards to the formation of a “committee” by the CT Trustee, it should be noted that in Section VII, paragraph I of the MOA, each Trustee is allowed to form an Advisory Group to provide input to the trustee on various aspects of the restoration process. The CT Trustee has formed such a group to ensure input on specific aspects of the restoration. The CT Trustee will also develop a public participation program that: (1) provides for public input during the development of the public participation plan; and (2) ensures that all interested groups and individuals have the opportunity to participate in the restoration planning process. The first order of business, upon formation of the CT SubCouncil, is the preparation of the public participation plan. (See also the response to Comment # 4.)

Comment #4: One organization (HEAL) commented that CT DEP has already procured professional services in the absence of a signed and finalized MOA and that no public participation or outreach occurred in the hiring of at least three consultants. Due to this disregard for citizen input and for the stakeholders along the river, the Commenter requests the fees submitted by CT DEP for these consulting services and any other costs associated with the use of coordinators or any other technical or administrative services associated with the development of implementation of a restoration plan without full public notification and involvement to be allocated and reimbursed from the NRD funds be rejected.

Trustee Response: The selection of technical consultants by CT is consistent with the provisions of Section VII paragraph F (8) of the MOA. A detailed evaluation of the expertise required for this particular project was undertaken. The State of Connecticut uses a widely accepted, formal process entitled Qualifications-Based Selection (“QBS”). The basic premise of the QBS process is to recruit and evaluate consultants based on their qualifications (experience and training) that are relevant to the specific project. The basic steps involved are as follows:

- Develop a project summary that describes the project and establishes the basis for criteria for evaluating responses.
- Publication of a Request for Qualifications (“RFQ”) – which provides public notice that the DEP is seeking to retain the services of a technical consultant.
- Interested firms respond with submission of Statements of Qualifications (“SOQs”)
- Evaluation of SOQs against criteria established by the selection committee and selection (“short listing”) of consultant firms for interview.
- Interview selected firms and evaluate against the criteria established by the selection committee.
- Selection of consultant.

- Develop Scope of Services in conjunction with selected consultant and negotiate an agreement (contract).

The CT Trustee initiated the QBS process in January of 2001 with the advertisement in three newspapers that technical consultants review for such advertisements. After review of the detailed statements of qualifications submitted, five firms were selected for interviews in April. Following the interviews and evaluation of additional information provided by the candidate firms, a consultant team was selected.

The CT Trustee is not only cognizant of the requirement for unanimous approval of the Council or relevant SubCouncil for any such expenditure; we participated in the drafting of those requirements. It is precisely because of this requirement, and the fact that none of the planning work can go forward without an executed MOA, that the CT Trustee has pressed for its prompt execution. No commitment or expenditure of NRD funds has occurred, and none will occur, until the SubCouncil is formed and has unanimously approved such expenditures.

Comment #5: One organization (HEAL) commented that Massachusetts residents have been provided with three comprehensive meetings with the federal Trustees since the release of the NRD settlement particulars and at points during the pending and draft MOA and despite numerous requests from the Commenter to both the federal Trustees and CT Trustee, Connecticut residents have not been afforded the same courtesy.

Trustee Response: In order to distribute the draft MOA in a fair and impartial manner to the public, the Trustees posted it only on EPA's web site for the GE/Housatonic River site. The EPA Internet site was chosen by the Trustees as a single point of information distribution, thus assuring that all parties have simultaneous access to one version of the MOA. In addition, updates for both the Citizens' Coordinating Council and the CT Subcommittee announced the posting of the MOA on EPA's web site. In regards to the informational meetings held in Massachusetts, those meetings were coordinated by EOEa with the federal Trustees to provide updates on the Restoration Planning process for the geographic area of Massachusetts.

Prior to the October 30, 2001, public meeting held in Massachusetts, the CT Trustee representative did not receive any requests for a public meeting from the commenter. The only request subsequent to October 30 was received from the commenter in an e-mail/letter dated 12/3/01 which was addressed to the CT Commissioner of Environmental Protection.

The CT Trustee representative has provided updates on the MOA development process at every meeting of the CT Sub Committee. Both the process, and, after publication, the content of the MOA, were the subject of discussion at CT Sub Committee meetings. Such meetings were not held specifically to discuss the MOA; however, the CT Trustee believes that the interested public in Connecticut had access to the same information regarding the process and the content of the MOA as has been provided elsewhere.

The Trustees believe that the public has had an opportunity to review the draft MOA, discuss it in a public forum, and provide written comments. As described above, as soon as the Trustees deemed the draft MOA sufficiently developed for public review, it was posted on the EPA website. Also as noted above, this information was publicized by the CT Sub Committee facilitator via email to everyone who provided his or her address.

Comment #6: Two comments were received questioning whether the MOA restricts the use of NRD monies for projects on the Housatonic River vs. projects on other rivers.

Trustee Response: The MOA is not intended to define the technical limits of restoration alternatives. Instead, the purpose of the MOA is to define the process that the Trustees will

utilize to evaluate and select restoration projects, a process that is based on statutory mandate and regulatory guidance. The Trustees have statutory responsibilities related to the natural resources injured, destroyed, or lost as a result of the release of hazardous substances and materials into the Housatonic River environment, the General Electric facility, and certain associated areas in Massachusetts and Connecticut. The Trustees' objective is to develop and implement comprehensive Restoration Plans in accordance with the requirements of federal and state laws that address the restoration of these injured natural resources. In pursuing this objective, the Trustees shall adhere to the goals of CERCLA and other principles including National Environmental Policy Act ("NEPA"), the DOI NRD Assessment regulations, and other state and federal laws.

CERCLA specifically limits the use of NRD recoveries to restore, replace, rehabilitate, or acquire the equivalent of the injured resources. As additional guidance, the DOI NRDA regulations recommend that Restoration Plans consider a range of alternatives that return the injured resources and their lost services to baseline. Potential restoration alternatives are not, by law, limited to the *geographical area* where the natural resource injury occurred, but are required to be directly relevant to the *natural resources* that were injured. Thus, when natural resource injuries involve, for instance, a community of migratory species, acceptable potential restoration alternatives *may* include restoration actions within the migratory range of the community but outside the geographical area where the injury originally occurred. Possible restoration alternatives could reflect varying rates of recovery, combinations of management actions, and needs for resource replacement and acquisitions. All alternatives should be evaluated according to ten factors including technical feasibility, cost/benefits, and cost-effectiveness. All projects submitted for consideration by any interested parties that meet the eligibility criteria of federal and state laws and regulations will be evaluated by the respective SubCouncils or Trustee Council. This can include projects in other rivers.

Comment #7: The CERCLA guidelines clearly prohibit the use of Superfund monies until "...adequate public notice and opportunity for hearing and consideration of all public comment." Please insure that interested stakeholders in CT are involved at each and every step in this process, and insure that the public's government is really working for the public.

Trustee Response: The Trustees believe the Commenter is referring to that part of CERCLA regarding the use of restoration monies, which is separate from Superfund. None of the natural resource damages recovery, aside from reimbursed past assessment costs and monies recovered by individual Trustee agencies as oversight costs, has been spent to date. As discussed in the response to Comment #4 above, no commitment or expenditure of funds allocated to the geographic region of Connecticut has occurred. Further, no expenditure or commitment of such funds will be made until reviewed and approved by the CT SubCouncil. The CT Trustee is committed to an active public involvement in the development of the restoration plan. This is discussed further in the response to Comment #3 above and # 9 below.

Comment # 8: Do sub-councils solely differentiate a Massachusetts versus a Connecticut sub-council, or may other sub-councils be formed? To what purpose?

Trustee Response: The MOA provides for the establishment of only two SubCouncils: a Massachusetts SubCouncil and a CT SubCouncil.

Comment #9: If an *ex officio* delegate to the Trustee Council is not required to be designated to serve on a SubCouncil, how much influence can the *ex officio* member have? Under what circumstances will an *ex officio* member be barred from serving on a sub-council?

Trustee Response: *Ex-Officio* delegates designated to the Trustee Council are not automatically designated to serve on the SubCouncils. Each SubCouncil may choose and designate, with public

input, its own *ex-officio* delegates to provide recommendations on the respective Restoration Plans, if the SubCouncil decides to appoint *ex-officio* delegates. Additional details regarding the roles and participation procedures of *ex-officio* delegates, if appointed, will be developed by each SubCouncil.

Comment #10: What is the purpose of designating a single *ex officio* delegate to the Trustee Council (VII, A, 4), versus multiple *ex officio* delegates to Trustee Sub-councils? (VII, B, 1)

Trustee Response: The MOA allows for designation of multiple *ex officio* delegates on the Trustee Council and SubCouncils.

Comment #11: The definition of “restoration” (definition O.) should be clarified and broadened to include educational activities to ensure the opportunity to advocate for educational activities to the extent that the law allows.

Trustee Response: The Trustees have defined “restoration” in the MOA in accordance with statutory and regulatory guidance. The definition remains unchanged. The Restoration Plans will consider and evaluate a range of restoration alternatives. Educational activities and other innovative projects may be considered for implementation if the projects meet the CERCLA mandated objective of restoring natural resources and/or services injured due to site contamination.

Comment #12: Other MOAs have granted *ex officio* members voting powers in the event that a resolution cannot be achieved otherwise. Thus, the Trustees should consider modifying the MOA to include voting powers for *ex-officio* members.

Trustee Response: CERCLA places the responsibility on the natural resource Trustees to make the decisions regarding the use of natural resource damage funds to ensure the goals of CERCLA are achieved. The Trustees, therefore, retain sole voting authority.

Comment #13: Under what circumstances may the Trustees go into executive session without *ex officio* representation?

Trustee Response: The Trustee MOA states that a Trustee Council or SubCouncil may decide to enter into a private executive session, excluding all non-Trustees and ex-officio members, if: (i) “the Trustees determine that the subject of the meeting is privileged for the purposes of litigation, or (ii) “the public disclosure of the Trustee Council’s (or SubCouncil’s) work would prejudice the effectiveness of the Trustee Council (or SubCouncil).” The Trustee Council/ SubCouncil(s) only anticipate entering executive sessions when appropriate. The times and general purposes of executive sessions will be included in the public record of Trustee activities. Examples of situations that may warrant an executive session include, but are not limited to:

- (a) discussions regarding possible further enforcement actions or any new Potentially Responsible Party with respect to the contamination of the Housatonic River Environment;
- (b) discussions involving matters relevant to public personal privacy considerations;
- (c) discussions involving matters considered confidential business information; and
- (d) discussions involving matters relevant to personnel issues.

Comment #14: Two comments were received regarding the public’s involvement in communications among Trustees.

- 1) One commenter stated that any conference calls held between Trustees during the NRD process and under the MOA should be taped and/or transcripts available. If any non-voting delegates are selected, they should be included in all non-executive session meetings, conference calls, and electronic communications.
- 2) One commenter inquired as to whether conference calls between Trustees constitute a

meeting and whether certain types of discussions are considered a Trustee Council or SubCouncil meeting, e.g. conference calls regarding funding decisions.

Trustee Response: The Trustees must be able to carry out their responsibilities efficiently. This necessarily includes the ability to conduct conference calls and electronic communications between all of the Trustees and between individual Trustees without having to include the interested public in every communication. The interested public's involvement is protected through the public meeting and written notice and comment processes. It is through these mechanisms that the Trustees make all substantive decisions on the public record and keep the interested public aware of their activities and progress on restoration planning and implementation.